Office of Administrative Services
FOIA Requester Service Center

July 30, 2019

Ms. Anne Weismann
Citizens for Responsibility and Ethics in Washington (CREW)
455 Massachusetts Ave., NW
Washington, DC 20001

Dear Ms. Weismann:

Per order of the U.S. Court of Appeals for the District of Columbia Circuit in Case No. 19-5134, please find attached the unredacted copies of the Finding and Determination (F&D) document(s). Please note that these are identical documents with the exception of footnote 4 on page 6, which is why we are providing you with multiple copies of the document.

Sincerely,

Travis Lewis

Travis Lewis
Deputy Director (formerly FOIA Director)
Office of Accountability and Transparency
Office of Administrative Services

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FINDINGS AND DETERMINATION
Cancellation of Request for Proposals (Phase I and II) FBI Headquarters Consolidation

I. BACKGROUND

This Findings and Determination ("F&D") concerns the General Services Administration (GSA) Request for Proposals (Phase I and II) ("RFP") for the FBI Headquarters Consolidation (the "Procurement" or "Project"). The RFP sought an exchange partner to develop, design, construct, deliver and operate a consolidated headquarters facility of up to 2.1 million rentable square feet for the U.S. Federal Bureau of Investigation ("FBI"). As consideration for its performance, the exchange partner would receive Federal construction funding and, upon completion and acceptance of the new FBI headquarters facility, fee simple title to the J. Edgar Hoover Building and land generally consisting of the full city block bounded by Pennsylvania Avenue and 9th, 10th, and E Streets, NW in Washington, D.C., (collectively referred to as "JEH").

In January 2013, GSA issued a Request for Information (RFI) to garner reaction from members of the development community, local and state jurisdictions, and other interested parties regarding feasibility, issues, and considerations related to a potential project exchange structure. The 38 responses to the RFI helped to inform GSA's strategic planning for the Project.

In November 2013, the RFI was followed by a Request for Expressions of Interest (REOI) for sites within the National Capital Region to be used for the development of a new FBI headquarters. From the site evaluation process, three acceptable sites were identified: one in Fairfax County, Virginia and two in Prince George's County, Maryland.

On December 19, 2014, GSA issued RFP Phase I for the Government to select a short-list of no more than five Offerors to compete in Phase II. On October 13, 2015, GSA identified four short-listed Offerors to proceed to Phase II of the Procurement.

On January 22, 2016, GSA issued RFP Phase II to the four qualified Phase I Offerors. This RFP Phase II set forth requirements for Phase II proposals for the selection of an exchange partner to design and construct the Project described in the RFP documents, and included the draft Design Build Exchange Agreement that the successful Offeror was expected and would be required to execute if selected.

RFP Phase I contained certain language to place offeror participants on affirmative notice that GSA was not warranting that the Procurement would proceed. Section E, paragraph A of the Phase I RFP stated: "This Phase I RFP shall not be construed in any manner to create

an obligation on the part of GSA to enter into any agreement, nor to implement any of the actions contemplated herein, nor to serve as the basis for any claim whatsoever for reimbursement of costs for efforts expended in preparing a response to the Phase I RFP or participating in the selection process."

Further, RFP Phase II contained the following quoted language to place offeror participants on affirmative notice that GSA was not warranting that the Procurement would proceed or that funding would be obtained:

- "Award of the Contract shall be subject to the availability of appropriated funds, and the Government shall incur no obligation under this RFP in advance of such time as funds are made available or appropriate funding authority is made available to the Contracting Officer for the purposes of Contract award." (Section B.3.1)
- "The Government reserves the right to reject all proposals if doing so is determined to be in the best interest of the government." (Section C.2.1)
- Additionally, "The Government may reject any or all proposals if such action is in the Government's interest." (Section D.1.e.2)

This D&F and related cancellation of the RFP are consistent with the foregoing provisions of the RFP.

II. DISCUSSION and FINDINGS

This Procurement relies upon authority found in 40 U.S.C. § 581 and 40 U.S.C. § 3304, together with Federal Acquisition Regulation concepts embodied in part 15 (contracting by negotiation) and part 36.3 (two phase design-build selection procedures). As historical context, successfully completed GSA exchange procurements have involved projects where the value of the Government exchange property was greater than or equal to the new facility being proposed.[1] GSA conceived using an exchange concept for the FBI HQ requirement at a point when the estimated Project cost was $1 billion (as referenced in Question For the Record dated April 24, 2013 for House Subcommittee on Economic Development, Public Buildings, and

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Emergency Management) and the estimated value of JEH was approximately $600 million based on a 2010 appraisal.[2] GSA believed funding for the $400 million difference was feasible. The circumstances surrounding the Procurement have evolved substantially since early formulation of the exchange construct.

a. Program Requirement for Up-Front Full Funding to Ensure Project Success

As the needs of FBI became more clearly identified over time, the cost of the Project increased, and GSA continued to inform Congress of the need for full funding of the Project in order for the Procurement to be awarded successfully, as is detailed in brief by excerpts of GSA communications to Congress, below:

<u>January 21-22, 2016 Briefings to House and Senate Oversight and Appropriation Committees Staff by William Dowd, Public Buildings Service (PBS) Project Executive, GSA; Richard Haley, Assistant Director/Chief Financial Officer, FBI; and Scott Nathan, Associate Director for General Government Programs, OMB</u>

- "What will the President's FY 2017 budget propose?
  - The President's FY 2017 Budget will propose construction funding of $759 million in the GSA Federal Buildings Fund and $646 million in the FBI's Construction account. Together, this construction funding should ensure that GSA is in a position to award a contract for the design and construction of the full consolidation of FBI HQ in FY 2017."
- "The FY 2017 Budget request will ensure that if Congress enacts the Administration's proposal, funding will be available to award a construction contract for full consolidation."

<u>February 8, 2016 Prospectus – Construction, FBI Headquarters Consolidation, National Capital Region</u>

- "The costs of the consolidated FBI Headquarters facility will be supported by: (1) FY 2016 enacted funds from the Omnibus Consolidated Appropriations Act, which included $180 million in FBI construction funding, $135 million in resources made available from the FBI's prior year balances, and $75 million in GSA FBF construction funding; (2) the value realized from the exchange of the JEH; (3) the President's Fiscal Year 2017 budget proposal of $759 million in construction funding within the GSA FBF; and (4) the President's Fiscal Year 2017 budget proposal of $646 million in the FBI's Construction account. *Combined, these funds should ensure that GSA is in a position to award the project on schedule in*

[2] The Office of Management and Budget assumed that $750 million could potentially be expected as a JEH credit for purposes of determining the FY 2017 budget request for "full funding" of the FBI HQ project.

FY 2017, and support the design and construction of the full consolidation." [Emphasis Added]

February 29, 2016 Statement of Denise Turner Roth, Administrator, GSA before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives

- "The President's FY 2017 request for the FBI Headquarters within the GSA budget [$759 million], paired with $646 million in the FBI's FY 2017 construction budget, as well as the value of the J. Edgar Hoover Building and the prior year resources, will allow GSA to award a contract for design and construction of a new FBI headquarters by the end of this calendar year."

October 24, 2016 Briefing to House and Senate Oversight and Appropriation Committee Staff by Michael Gelber, Deputy PBS Commissioner, GSA and Richard Haley, Assistant Director/Chief Financial Officer, FBI

- "One thing that the overwhelming developer response has cemented is that: 1) FBI HQ remains FBI and GSA's highest funding priority, and 2) we need the funding level requested for FY 2017. We cannot underscore clearly enough that these resources are necessary to capitalize on that interest level and deliver the project in a timely way. We have a unique opportunity to execute this transaction in FY 2017 – and that opportunity will not wait."
- "What if Congress doesn't provide full funding in FY 2017? How would that impact that project timeline?
    - We will not be able to execute an award for construction until both FBI and GSA receive the full funding requested in FY 2017.
    - Any delay by Congress in providing that funding will cause delays in project delivery beyond our updated schedule.
    - Delays in appropriated funding may well put the whole project at risk; due to the offerors' commitment of their own resources, these offerors are not going to be able to keep their offers on the table indefinitely. This has the potential of increasing the total cost of the project and lowering the value of the Hoover building."
- "Is this project scalable? What are the minimum funding requirements for FBI HQ project in FY 2017?
    - Practically speaking, no.
    - Scaling or phasing the project would extend the timeline for project delivery, significantly increase the cost of constructing a new FBI Headquarters, potentially devalue Hoover based on a delayed turnover, and not achieve FBI mission requirements.
    - We will not be able to execute an award until both FBI and GSA receive the full funding requested in FY 2017."

In the appendix to this F&D are contained Offeror Requests for Information and GSA's responses during the procurement indicating a high level of concern by the Offerors in terms of problems that might be caused by less than full up-front funding of the Project. GSA's answers indicated that the agency was anticipating such full up-front funding.

GSA has repeatedly communicated - to Congress, the agency's Office of Inspector General, and Offerors - that less than full up-front funding of the Project would place the Project at risk.

b. Insufficiency of Credit Value Received for JEH Asset

In studying ways to provide FBI with a new headquarters, GSA commissioned an independent, licensed appraiser in 2010 to appraise JEH under several scenarios. Of those scenarios, two are most relevant to this Procurement. The appraiser's opinions of the estimated market values "As Is", of the fee simple interest effective August 20, 2010 with an unoccupied building was $595,000,000 and Prospective Market Value of the entire underlying land area and sold as one parcel, "as vacant and available to be developed to its highest and best use" as of August 20, 2019 was $610,000,000.

As the Procurement proceeded and in order to evaluate the Offeror's valuation of JEH, GSA commissioned another appraisal in 2016 to determine the fair market value of the land only, as if vacant, unimproved and available for development. The appraiser's opinion was that the value of the property as of December 15, 2016 was $488,000,000. Independent demolition contractors had provided GSA in 2016 with estimates for razing the JEH building at approximately $40,000,000, indicating that the "As Is" condition value at approximately $448,000,000, for an immediate closing.

GSA's experience in certain exchange transactions, such as the Federal Triangle South initiative, corroborates agency concerns regarding JEH valuation. Receipt of initial Procurement offers further validated these concerns. As a result, GSA issued an amendment placing offerors on notice to maximize JEH credit values and provide their best offer. The amendment further notified Offerors that GSA retained discretion to cancel if JEH credit values were not high enough. RFP Phase II, as amended, contained the following quoted language to place offeror participants on affirmative notice of the manner in which the agency was to consider credit offers from the JEH asset:

- "Any proposal including an initial proposal, that offers a value for the JEH Credit that the Government, in its sole discretion, does not consider to be fair and reasonable, may result in the entirety of the offeror's proposal being rejected without further consideration." (Section C.2.2)

The Government added the foregoing clause by amendment to the RFP because the Government became concerned that the structure of the exchange might reduce the value offered for JEH. Including this provision explicitly placed Offerors on notice of the potential of such non-acceptance. Notwithstanding this amendment, the Final Proposal Revisions (FPR) credit offers for JEH fell below appraised values. Furthermore, FPR offers for JEH generally moved *downwards* relative to initial proposal offers.[3]

The FPRs received January 6, 2017 contained values offered for JEH of \$333,980,000;[4] \$350,000,000; and \$405,000,000. Under the Procurement, such a credit would be available to the Project at the end of the construction delivery schedule, a number of years in the future, and potentially many years in the future if necessary appropriated funds were not received, thereby further reducing the net value or 'purchasing power' of the credit. These JEH credit values, when viewed in comparison to the independent appraisals, were not "fair and reasonable" and fell far short of the Government value assumptions underlying the FY 2017 budget request.

In short, assumptions for "full funding" presumed a JEH value significantly higher than credit offers received.

c. Among other Areas of Uncertainty, Funding Uncertainty and Delay Diminishes Efficacy of JEH Credit Value and Increases Need for Appropriated Funds

Developers valuing JEH in an exchange that would occur in more than seven years after contract award had to consider additional risk factors over that period of time.[5] The exchange structure contemplated by the FBI HQ project differed significantly from a traditional Government disposal where conveyance would occur virtually immediately following public sale and closing. This extended time for conveyance and associated investment risk resulted in downward pressure on the exchange value of JEH. Current uncertainty regarding the timing of future Project funding and the ability for project design and construction activity to proceed without delay or interruption would likely create increased downward pressure on JEH credit value while, at the same time, creating upward pressure on construction cost.

In a similar vein, additional uncertainty is introduced pertaining to Assignable Purchase Options for private land that could be the location of the new HQ – the Landover and Greenbelt sites. At present, these Assignable Purchase Options expire Sep. 30, 2017 and have already been extended on multiple occasions. The two site owners have not offered definite responses to GSA's most recent requests for extension. Terms and conditions for any such extensions have not been finalized and could ultimately yield additional expense for the government. In addition to potential added expense related to use of the sites, the timing related to a potential

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[3] Initial proposal offers for JEH were \$350,000,000; \$411,412,000, \$425,000,000.
[4] The offeror submitting this JEH credit also included an alternate credit figure that varied by approximately \$1M dependent upon the new HQ site that was selected by GSA.
[5] See GSA OIG report A160024/P/R/R17004, *supra.*

re-opening of proposals to allow bidders to refresh, at a minimum, their offered pricing, the evaluation of such further FPRs, and other Government evaluation processes that are necessary prerequisites to any award, add further timing uncertainty to an already uncertain funding landscape. This also could result in offerors submitting higher priced construction cost proposals together with further devaluations of JEH credit values in such proposals.

In specific relation to this Project and more generally, GSA's OIG has articulated concerns related to devaluation pressures placed upon assets GSA attempts to include in exchange projects, such as those that follow.[6]

September 12, 2013 GSA-OIG Monitoring Service

- The GSA-OIG notified GSA's National Capital Region on September 12, 2013 that it would be conducting a Monitoring Service of the FBI Headquarters Consolidation project. Among other questions and areas of interest, GSA-OIG has had an initial and continued interest in discussing "potential funding alternatives should the JEH building not provide sufficient assets for the FBI HQ Consolidation Program of Requirements."

March 30, 2017 GSA-OIG "Audit of PBS's Planning and Funding for Exchange Projects", Report A160024/P/R/R17004

- "Finding 1 – PBS did not fully factor risk into its planning for exchange projects..."

[6] Others articulated similar concerns. See eg, FBI RFI Report (July 10, 2013) noting that potential developers commented on the timing of the exchange and impact on the value of JEH. See eg, H. Rept. 114-624, Report of the Committee of Appropriations, June 15, 2016, ("This Committee has consistently questioned whether an exchange was financially and practically advisable and whether GSA's decision to forgo the normal disposal process would obtain the best deal for the taxpayer.") See eg O'Connell, *Hoyer: I'm not a fan of Hoover Building swap for FBI headquarters*, Washington Post, December 5, 2015 (stating "House Minority Whip Steny Hoyer (D-Md.) said Thursday that he was encouraged by the Obama administration's efforts to build a new FBI headquarters, but that he is exploring ways to pay for it other than by trading the J. Edgar Hoover Building to a developer.") See eg, Heckman, J.; *New FBI headquarters gets go-ahead from House committee*; (2016, December 07), from Federal News Radio: https://federalnewsradio.com/agency-oversight/2016/12/new-fbi-headquarters-gets-go-ahead-house-committee/ ("I am concerned that they've come up with this bizarre construct where they're going to try to get someone to bid on buying the old FBI headquarters and building the new one. I think pairing the two is stupid, it's certainly going to limit the number of people who are interested in constructing and bidding on the new FBI headquarters. I'm concerned that we won't get full value for the downtown property, and I assume this is being done by GSA because they don't want to ask for an appropriation for the entire new project, so they're just going to muddy up the water here and mush the two together," Ranking member Peter DeFazio said.)

- "PBS's current guidance, the 1997 Exchange Guidance and Section 412 Guidance, does not require it to quantify risk, nor does it address discounting property values to account for the time the developer will have to wait to realize a return on its investment in exchanges. In exchanges involving construction services, the developer must complete the construction services before receiving the government's property as consideration. Depending on the extent of the construction services, this may take several years. As a result, developers discount the value of PBS's properties to account for investment risk. While PBS was conceptually aware of this risk, it did not fully factor the risk into its initial decisions to pursue exchanges or into the value it expected to receive for its properties from developers."

- "PBS relied heavily on appraisals to establish the value of its properties. PBS officials noted that appraisals are generally only relevant and reliable for 12 months since they are based on current market conditions." "However, appraisals do not factor in the extended length of exchange transactions and the time it would take for the developer to receive the property. PBS also did not discount property values in its financial analyses or business cases to account for future market conditions or other risks, such as change order risk, that developers factored into their evaluations."

GSA used appraisals for the initial valuation of JEH to decide to pursue an exchange and did not estimate the full cost effect of these risks. However, as the Project progressed, it did eventually estimate the value of JEH accounting for the risks associated with a delayed exchange. These valuations and cost estimates were a basis of the FY 2017 budget request. However, in this Project the risk of funding delays for the Government's contribution to the cost of the new facility can significantly compound the devaluation of JEH and increase the Project's cost.

d. Recent Appropriations, Budget Activity, and Executive Branch Leadership

The FY 2017 budget request included $1.405 billion for a new FBI Headquarters consolidation; however, the funds appropriated leave an $882 million gap, which also does not account for the additional pressure created by the JEH valuation described in this F&D. The FY 2017 appropriation (provided in May 2017) only included $523 million ($323 million for FBI and $200 million for GSA), bringing the current appropriated amount for the Project to $703 million, well short of full funding required for full consolidation. Funding was not requested in FY 2018 in the expectation that FY 2017 budget request would be fully funded.

On June 28, 2017, a House Appropriations Subcommittee released the FY 2018 Financial Services and General Government Appropriations bill which, in Section 518 if enacted, would rescind the "unobligated balance of amounts provided for National Capital Region, FBI Headquarters Consolidation, in paragraph (1)(A) under the heading "General Services Administration—Federal Buildings Fund" in division E of Public Law 115-31." This proposed rescission is further indication that full and timely funding of the Project is highly unlikely, and contributes to increasing uncertainty regarding the potential for full funding to be received in a timeframe that would not delay project performance.

Although Offeror proposals were received in January, 2017 and GSA proceeded diligently in its evaluation, GSA placed the Procurement on hold until the FY 2017 budget was completed in May 2017. Since the full request was not funded at that time, GSA has since then been evaluating if and how the Project might proceed, which has led to related internal executive branch coordination and this F&D.

GSA has coordinated with FBI and the Office of Management and Budget throughout the implementation of this Procurement initiative. Administration coordination has yielded independent input indicating that inclusion of the exchange component of this initiative is not favored.

e. Summation of Rational Basis for Cancellation

From the issuance of RFP Phase II and the submission of the FY 2017 budget request, GSA consistently and repeatedly informed Congress of the need for the full budget request to be funded in order to make an award. GSA stressed that phasing the Project was not practical and that full and timely funding was necessary. In addition, throughout the RFP Phase II process Offerors questioned the consequences of not receiving full or timely funding and were aware of the associated risks. Beginning with the issuance of RFP Phase I, continuing through RFP Phase II and the responses to Requests for Information from Offerors, GSA has consistently and repeatedly stressed that the Government is under no obligation to enter into any agreement, nor to implement any of the actions contemplated within those documents, and may cancel the Procurement. It is acknowledged that the Procurement and associated Design Build Exchange contract were prepared to allow award without full funding; however, the magnitude of the increase in costs due to delayed appropriated funding is too great to continue the Procurement and is beyond what GSA reasonably expected when the agency was contemplating an award without full funding. Since the lapse of time from receipt of FPRs would require GSA to seek a "refresh" of offeror pricing proposals, at a minimum, the agency's expectation would be that uncertainties over future funding (as evidenced by the House Appropriations Subcommittee's rescission language) will result in cost proposals going up to account for uncertainty, and JEH credit values being reduced.

All of the foregoing issues support the use of more tested, conventional project delivery methods that should minimize costs while, at the same time, allow for maximization of JEH value since the property would be disposed in a timeframe more proximate to when the Government will be able to convey to the successful purchaser. De-linking the two transactions (construction of a new FBI HQ and disposal of the current FBI HQ) significantly un-complicates the overall project structure and offeror financing issues. Cancellation will also provide an opportunity to work further with FBI to better understand their program needs, and refine those needs such that when GSA is prepared to pursue a more conventional delivery approach, FBI's program needs are assured to be current as of that time.

These Findings indicate it is necessary and within the agency's discretion to cancel the current Procurement.

III. DETERMINATION

Consistent with the terms of the RFP, and applicable legal authority, GSA has determined it is reasonable and in the best interest of the Government to cancel the FBI Headquarters Procurement. GSA will work to develop an alternative procurement approach that will eliminate the risks associated with the current Procurement structure, reduce overall project costs, and position the Government to maximize JEH disposal value when that facility is ready to be vacated.

[Signatures follow.]

Mary Pineda _______________ 10 July 2017
Mary Pineda Date
Contracting Officer
Public Buildings Service (WPH1C)

Joel T. Berelson _______________ 7/10/17
Joel T. Berelson Date
Contracting Officer
Public Buildings Service (WPRA)

_______________ 7/10/17
Mary D. Gibert Date
Regional Commissioner
Public Buildings Service (WP)

APPENDIX

- OFFEROR QUESTION: Section B.3.1 states that each phase of the work pursuant to the Contract shall be subject to the availability of appropriated funds. The delay in appropriation of funds could delay the completion of the overall project and the date by which the JEH would be transferred to the Offeror. How will the Government account for potential increases in costs or reductions in value if the Project is delayed due to delays in approval of appropriations? (RFI #37; 2/22/2016)

    - The contractor may recover for compensable delays through the equitable adjustment process.

- OFFEROR QUESTION: Appropriations - What happens if the Government Contribution has been exhausted, the Exchange Value has been exhausted, and the project is not complete because of Government delay or changes to the project? Will the Government require additional appropriations to cover such costs? What if they are not obtained? Will the Government commit to using best efforts to obtain necessary appropriations? (RFI #117; 5/13/2016)

    - It is the Government's intention to seek and obtain all necessary appropriations.

- OFFEROR QUESTION: Substantial Completion - Section I.B(2), III.A - It appears that Developer must propose a final, binding Substantial Completion date for the entire project during the Concept Design Phase. If the date is missed, Developer is in default and subject to significant liquidated damages. The Government has suggested that Developer is protected by the "excusable delay" provisions of the FAR and that Developer can request equitable adjustments for "compensable delay." However, the DBEA also states that schedule extensions may be granted or withheld in the Government's sole discretion. Given this language, it would be helpful if the Government could confirm the following: (i) Government delay can result in both an extension of the schedule (thereby forestalling liquidated damages) and an equitable adjustment of the JEH value (reflecting the increased carry costs for Developer and the time value of money); (ii) Delays from failures of Congress to appropriate funds will constitute Government delay; and (iii) Repeated or excessively protracted design reviews will constitute Government delay. (RFI 114; 5/13/2016)

    - (i) Government caused delays, without any developer concurrent delays, shall be resolved at time of impact per the terms of the contract and time extensions would not subject the Developer to LDs. Subject to a pending

amendment, the Bid sheet will identify a bid cost for delays for three periods over the contract duration as follows: 1) Design phase; 2) construction phase; 3) Post substantial completion. Equitable adjustments of the JEH value are not anticipated. (ii) The Contract is subject to availability of funds and bound by the Antideficiency Act; limited notices to proceed will be issued for funds available. The Government has no requirement to issue NTP prior to funding. Failure of Congress to appropriate funds is not anticipated to constitute Government delay. The contracting officer would not issue a partial notice to proceed unless such NTP was in accordance with the DBEA. (iii) Design reviews by the government are identified in the RFP. Design submission requirements are identified on P-100 and the Developer shall provide their design quality review program to address their quality control measure to mitigate design deficiencies with each submission. The developer may elect to hold on-board reviews or presentations of each submission with the reviewers to minimize time for large or complex design submissions. If Developer requests and the CO approves a fast track design, the design review performance periods shall be scheduled to avoid federal holidays and overlapping review periods for submissions. The Government intends to review and approve design deliverables in accordance with the DBEA.

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FBI Headquarters Consolidation

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- "The FY 2017 Budget request will ensure that if Congress enacts the Administration's proposal, funding will be available to award a construction contract for full consolidation."

February 8, 2016 Prospectus – Construction, FBI Headquarters Consolidation, National Capital Region

- "The costs of the consolidated FBI Headquarters facility will be supported by: (1) FY 2016 enacted funds from the Omnibus Consolidated Appropriations Act, which included $180 million in FBI construction funding, $135 million in resources made available from the FBI's prior year balances, and $75 million in GSA FBF construction funding; (2) the value realized from the exchange of the JEH; (3) the President's Fiscal Year 2017 budget proposal of $759 million in construction funding within the GSA FBF; and (4) the President's Fiscal Year 2017 budget proposal of $646 million in the FBI's Construction account. *Combined, these funds should ensure that GSA is in a position to award the project on schedule in*

[2] The Office of Management and Budget assumed that $750 million could potentially be expected as a JEH credit for purposes of determining the FY 2017 budget request for "full funding" of the FBI HQ project.

FY 2017, and support the design and construction of the full consolidation." [Emphasis Added]

February 29, 2016 Statement of Denise Turner Roth, Administrator, GSA before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives

- "The President's FY 2017 request for the FBI Headquarters within the GSA budget [$759 million], paired with $646 million in the FBI's FY 2017 construction budget, as well as the value of the J. Edgar Hoover Building and the prior year resources, will allow GSA to award a contract for design and construction of a new FBI headquarters by the end of this calendar year."

October 24, 2016 Briefing to House and Senate Oversight and Appropriation Committee Staff by Michael Gelber, Deputy PBS Commissioner, GSA and Richard Haley, Assistant Director/Chief Financial Officer, FBI

- "One thing that the overwhelming developer response has cemented is that: 1) FBI HQ remains FBI and GSA's highest funding priority, and 2) we need the funding level requested for FY 2017. We cannot underscore clearly enough that these resources are necessary to capitalize on that interest level and deliver the project in a timely way. We have a unique opportunity to execute this transaction in FY 2017 – and that opportunity will not wait."
- "What if Congress doesn't provide full funding in FY 2017? How would that impact that project timeline?
  - We will not be able to execute an award for construction until both FBI and GSA receive the full funding requested in FY 2017.
  - Any delay by Congress in providing that funding will cause delays in project delivery beyond our updated schedule.
  - Delays in appropriated funding may well put the whole project at risk; due to the offerors' commitment of their own resources, these offerors are not going to be able to keep their offers on the table indefinitely. This has the potential of increasing the total cost of the project and lowering the value of the Hoover building."
- "Is this project scalable? What are the minimum funding requirements for FBI HQ project in FY 2017?
  - Practically speaking, no.
  - Scaling or phasing the project would extend the timeline for project delivery, significantly increase the cost of constructing a new FBI Headquarters, potentially devalue Hoover based on a delayed turnover, and not achieve FBI mission requirements.
  - We will not be able to execute an award until both FBI and GSA receive the full funding requested in FY 2017."

In the appendix to this F&D are contained Offeror Requests for Information and GSA's responses during the procurement indicating a high level of concern by the Offerors in terms of problems that might be caused by less than full up-front funding of the Project. GSA's answers indicated that the agency was anticipating such full up-front funding.

GSA has repeatedly communicated - to Congress, the agency's Office of Inspector General, and Offerors - that less than full up-front funding of the Project would place the Project at risk.

b. Insufficiency of Credit Value Received for JEH Asset

In studying ways to provide FBI with a new headquarters, GSA commissioned an independent, licensed appraiser in 2010 to appraise JEH under several scenarios. Of those scenarios, two are most relevant to this Procurement. The appraiser's opinions of the estimated market values "As Is", of the fee simple interest effective August 20, 2010 with an unoccupied building was \$595,000,000 and Prospective Market Value of the entire underlying land area and sold as one parcel, "as vacant and available to be developed to its highest and best use" as of August 20, 2019 was \$610,000,000.

As the Procurement proceeded and in order to evaluate the Offeror's valuation of JEH, GSA commissioned another appraisal in 2016 to determine the fair market value of the land only, as if vacant, unimproved and available for development. The appraiser's opinion was that the value of the property as of December 15, 2016 was \$488,000,000. Independent demolition contractors had provided GSA in 2016 with estimates for razing the JEH building at approximately \$40,000,000, indicating that the "As Is" condition value at approximately \$448,000,000, for an immediate closing.

GSA's experience in certain exchange transactions, such as the Federal Triangle South initiative, corroborates agency concerns regarding JEH valuation. Receipt of initial Procurement offers further validated these concerns. As a result, GSA issued an amendment placing offerors on notice to maximize JEH credit values and provide their best offer. The amendment further notified Offerors that GSA retained discretion to cancel if JEH credit values were not high enough. RFP Phase II, as amended, contained the following quoted language to place offeror participants on affirmative notice of the manner in which the agency was to consider credit offers from the JEH asset:

- "Any proposal including an initial proposal, that offers a value for the JEH Credit that the Government, in its sole discretion, does not consider to be fair and reasonable, may result in the entirety of the offeror's proposal being rejected without further consideration." (Section C.2.2)

The Government added the foregoing clause by amendment to the RFP because the Government became concerned that the structure of the exchange might reduce the value offered for JEH. Including this provision explicitly placed Offerors on notice of the potential of such non-acceptance. Notwithstanding this amendment, the Final Proposal Revisions (FPR) credit offers for JEH fell below appraised values. Furthermore, FPR offers for JEH generally moved *downwards* relative to initial proposal offers.[3]

The FPRs received January 6, 2017 contained values offered for JEH of $333,980,000;[4] $350,000,000; and $405,000,000. Under the Procurement, such a credit would be available to the Project at the end of the construction delivery schedule, a number of years in the future, and potentially many years in the future if necessary appropriated funds were not received, thereby further reducing the net value or 'purchasing power' of the credit. These JEH credit values, when viewed in comparison to the independent appraisals, were not "fair and reasonable" and fell far short of the Government value assumptions underlying the FY 2017 budget request.

In short, assumptions for "full funding" presumed a JEH value significantly higher than credit offers received.

c. Among other Areas of Uncertainty, Funding Uncertainty and Delay Diminishes Efficacy of JEH Credit Value and Increases Need for Appropriated Funds

Developers valuing JEH in an exchange that would occur in more than seven (7) years after contract award had to consider additional risk factors over that period of time.[5] The exchange structure contemplated by the FBI HQ project differed significantly from a traditional Government disposal where conveyance would occur virtually immediately following public sale and closing. This extended time for conveyance and associated investment risk resulted in downward pressure on the exchange value of JEH. Current uncertainty regarding the timing of future Project funding and the ability for project design and construction activity to proceed without delay or interruption would likely create increased downward pressure on JEH credit value while, at the same time, creating upward pressure on construction cost.

In a similar vein, additional uncertainty is introduced pertaining to Assignable Purchase Options for private land that could be the location of the new HQ – the Landover and Greenbelt sites. At present, these Assignable Purchase Options expire Sep. 30, 2017 and have already been extended on multiple occasions. The two site owners have not offered definite responses to GSA's most recent requests for extension. Terms and conditions for any such extensions have not been finalized and could ultimately yield additional expense for the government. In addition to potential added expense related to use of the sites, the timing related to a potential

[3] Initial proposal offers for JEH were $350,000,000; $411,412,000, $425,000,000.
[4] The offeror submitting this offer also included an alternate credit figure that varied by approximately $1M dependent upon the new HQ site that was selected by GSA.
[5] See GSA OIG report A160024/P/R/R17004, *supra*.

re-opening of proposals to allow bidders to refresh, at a minimum, their offered pricing, the evaluation of such further FPRs, and other Government evaluation processes that are necessary prerequisites to any award, add further timing uncertainty to an already uncertain funding landscape. This also could result in offerors submitting higher priced construction cost proposals together with further devaluations of JEH credit values in such proposals.

In specific relation to this Project and more generally, GSA's OIG has articulated concerns related to devaluation pressures placed upon assets GSA attempts to include in exchange projects, such as those that follow.[6]

September 12, 2013 GSA-OIG Monitoring Service

- The GSA-OIG notified GSA's National Capital Region on September 12, 2013 that it would be conducting a Monitoring Service of the FBI Headquarters Consolidation project. Among other questions and areas of interest, GSA-OIG has had an initial and continued interest in discussing "potential funding alternatives should the JEH building not provide sufficient assets for the FBI HQ Consolidation Program of Requirements."

March 30, 2017 GSA-OIG "Audit of PBS's Planning and Funding for Exchange Projects", Report A160024/P/R/R17004

- "Finding 1 – PBS did not fully factor risk into its planning for exchange projects..."

[6] Others articulated similar concerns. See eg, FBI RFI Report (July 10, 2013) noting that potential developers commented on the timing of the exchange and impact on the value of JEH. See eg, H. Rept. 114-624, Report of the Committee of Appropriations, June 15, 2016, ("This Committee has consistently questioned whether an exchange was financially and practically advisable and whether GSA's decision to forgo the normal disposal process would obtain the best deal for the taxpayer.") See eg O'Connell, *Hoyer: I'm not a fan of Hoover Building swap for FBI headquarters*, Washington Post, December 5, 2015 (stating "House Minority Whip Steny Hoyer (D-Md.) said Thursday that he was encouraged by the Obama administration's efforts to build a new FBI headquarters, but that he is exploring ways to pay for it other than by trading the J. Edgar Hoover Building to a developer.") See eg, Heckman, J.; *New FBI headquarters gets go-ahead from House committee*; (2016, December 07), from Federal News Radio: https://federalnewsradio.com/agency-oversight/2016/12/new-fbi-headquarters-gets-go-ahead-house-committee/ ("I am concerned that they've come up with this bizarre construct where they're going to try to get someone to bid on buying the old FBI headquarters and building the new one. I think pairing the two is stupid, it's certainly going to limit the number of people who are interested in constructing and bidding on the new FBI headquarters. I'm concerned that we won't get full value for the downtown property, and I assume this is being done by GSA because they don't want to ask for an appropriation for the entire new project, so they're just going to muddy up the water here and mush the two together," Ranking member Peter DeFazio said.)

- "PBS's current guidance, the 1997 Exchange Guidance and Section 412 Guidance, does not require it to quantify risk, nor does it address discounting property values to account for the time the developer will have to wait to realize a return on its investment in exchanges. In exchanges involving construction services, the developer must complete the construction services before receiving the government's property as consideration. Depending on the extent of the construction services, this may take several years. As a result, developers discount the value of PBS's properties to account for investment risk. While PBS was conceptually aware of this risk, it did not fully factor the risk into its initial decisions to pursue exchanges or into the value it expected to receive for its properties from developers."

- "PBS relied heavily on appraisals to establish the value of its properties. PBS officials noted that appraisals are generally only relevant and reliable for 12 months since they are based on current market conditions." "However, appraisals do not factor in the extended length of exchange transactions and the time it would take for the developer to receive the property. PBS also did not discount property values in its financial analyses or business cases to account for future market conditions or other risks, such as change order risk, that developers factored into their evaluations."

GSA used appraisals for the initial valuation of JEH to decide to pursue an exchange and did not estimate the full cost effect of these risks. However, as the Project progressed, it did eventually estimate the value of JEH accounting for the risks associated with a delayed exchange. These valuations and cost estimates were a basis of the FY 2017 budget request. However, in this Project the risk of funding delays for the Government's contribution to the cost of the new facility can significantly compound the devaluation of JEH and increase the Project's cost.

d. Recent Appropriations, Budget Activity, and Executive Branch Leadership

The FY 2017 budget request included $1.405 billion for a new FBI Headquarters consolidation; however, the funds appropriated leave an $882 million gap, which also does not account for the additional pressure created by the JEH valuation described in this F&D. The FY 2017 appropriation (provided in May 2017) only included $523 million ($323 million for FBI and $200 million for GSA), bringing the current appropriated amount for the Project to $703 million, well short of full funding required for full consolidation. Funding was not requested in FY 2018 in the expectation that FY 2017 budget request would be fully funded.

On June 28, 2017, a House Appropriations Subcommittee released the FY 2018 Financial Services and General Government Appropriations bill which, in Section 518 if enacted, would rescind the "unobligated balance of amounts provided for National Capital Region, FBI Headquarters Consolidation, in paragraph (1)(A) under the heading "General Services Administration—Federal Buildings Fund" in division E of Public Law 115-31." This proposed rescission is further indication that full and timely funding of the Project is highly unlikely, and contributes to increasing uncertainty regarding the potential for full funding to be received in a timeframe that would not delay project performance.

Although Offeror proposals were received in January, 2017 and GSA proceeded diligently in its evaluation, GSA placed the Procurement on hold until the FY 2017 budget was completed in May 2017. Since the full request was not funded at that time, GSA has since then been evaluating if and how the Project might proceed, which has led to related internal executive branch coordination and this F&D.

GSA has coordinated with FBI and the Office of Management and Budget throughout the implementation of this Procurement initiative. Administration coordination has yielded independent input indicating that inclusion of the exchange component of this initiative is not favored.

e. Summation of Rational Basis for Cancellation

From the issuance of RFP Phase II and the submission of the FY 2017 budget request, GSA consistently and repeatedly informed Congress of the need for the full budget request to be funded in order to make an award. GSA stressed that phasing the Project was not practical and that full and timely funding was necessary. In addition, throughout the RFP Phase II process Offerors questioned the consequences of not receiving full or timely funding and were aware of the associated risks. Beginning with the issuance of RFP Phase I, continuing through RFP Phase II and the responses to Requests for Information from Offerors, GSA has consistently and repeatedly stressed that the Government is under no obligation to enter into any agreement, nor to implement any of the actions contemplated within those documents, and may cancel the Procurement. It is acknowledged that the Procurement and associated Design Build Exchange contract were prepared to allow award without full funding; however, the magnitude of the increase in costs due to delayed appropriated funding is too great to continue the Procurement and is beyond what GSA reasonably expected when the agency was contemplating an award without full funding. Since the lapse of time from receipt of FPRs would require GSA to seek a "refresh" of offeror pricing proposals, at a minimum, the agency's expectation would be that uncertainties over future funding (as evidenced by the House Appropriations Subcommittee's rescission language) will result in cost proposals going up to account for uncertainty, and JEH credit values being reduced.

All of the foregoing issues support the use of more tested, conventional project delivery methods that should minimize costs while, at the same time, allow for maximization of JEH value since the property would be disposed in a timeframe more proximate to when the Government will be able to convey to the successful purchaser. De-linking the two transactions (construction of a new FBI HQ and disposal of the current FBI HQ) significantly un-complicates the overall project structure and offeror financing issues. Cancellation will also provide an opportunity to work further with FBI to better understand their program needs, and refine those needs such that when GSA is prepared to pursue a more conventional delivery approach, FBI's program needs are assured to be current as of that time.

These Findings indicate it is necessary and within the agency's discretion to cancel the current Procurement.

III. DETERMINATION

Consistent with the terms of the RFP, and applicable legal authority, GSA has determined it is reasonable and in the best interest of the Government to cancel the FBI Headquarters Procurement. GSA will work to develop an alternative procurement approach that will eliminate the risks associated with the current Procurement structure, reduce overall project costs, and position the Government to maximize JEH disposal value when that facility is ready to be vacated.

[Signatures follow.]

Mary Pineda
Contracting Officer
Public Buildings Service (WPH1C)

10 July 2017
Date

Joel T. Berelson
Contracting Officer
Public Buildings Service (WPRA)

7/10/17
Date

Mary D. Gibert
Regional Commissioner
Public Buildings Service (WP)

7/10/17
Date

APPENDIX

- OFFEROR QUESTION: Section B.3.1 states that each phase of the work pursuant to the Contract shall be subject to the availability of appropriated funds. The delay in appropriation of funds could delay the completion of the overall project and the date by which the JEH would be transferred to the Offeror. How will the Government account for potential increases in costs or reductions in value if the Project is delayed due to delays in approval of appropriations? (RFI #37; 2/22/2016)
    - The contractor may recover for compensable delays through the equitable adjustment process.
- OFFEROR QUESTION: Appropriations - What happens if the Government Contribution has been exhausted, the Exchange Value has been exhausted, and the project is not complete because of Government delay or changes to the project? Will the Government require additional appropriations to cover such costs? What if they are not obtained? Will the Government commit to using best efforts to obtain necessary appropriations? (RFI #117; 5/13/2016)
    - It is the Government's intention to seek and obtain all necessary appropriations.
- OFFEROR QUESTION: Substantial Completion - Section I.B(2), III.A - It appears that Developer must propose a final, binding Substantial Completion date for the entire project during the Concept Design Phase. If the date is missed, Developer is in default and subject to significant liquidated damages. The Government has suggested that Developer is protected by the "excusable delay" provisions of the FAR and that Developer can request equitable adjustments for "compensable delay." However, the DBEA also states that schedule extensions may be granted or withheld in the Government's sole discretion. Given this language, it would be helpful if the Government could confirm the following: (i) Government delay can result in both an extension of the schedule (thereby forestalling liquidated damages) and an equitable adjustment of the JEH value (reflecting the increased carry costs for Developer and the time value of money); (ii) Delays from failures of Congress to appropriate funds will constitute Government delay; and (iii) Repeated or excessively protracted design reviews will constitute Government delay. (RFI 114; 5/13/2016)
    - (i) Government caused delays, without any developer concurrent delays, shall be resolved at time of impact per the terms of the contract and time extensions would not subject the Developer to LDs. Subject to a pending

amendment, the Bid sheet will identify a bid cost for delays for three periods over the contract duration as follows: 1) Design phase; 2) construction phase; 3) Post substantial completion. Equitable adjustments of the JEH value are not anticipated. (ii) The Contract is subject to availability of funds and bound by the Antideficiency Act; limited notices to proceed will be issued for funds available. The Government has no requirement to issue NTP prior to funding. Failure of Congress to appropriate funds is not anticipated to constitute Government delay. The contracting officer would not issue a partial notice to proceed unless such NTP was in accordance with the DBEA. (iii) Design reviews by the government are identified in the RFP. Design submission requirements are identified on P-100 and the Developer shall provide their design quality review program to address their quality control measure to mitigate design deficiencies with each submission. The developer may elect to hold on-board reviews or presentations of each submission with the reviewers to minimize time for large or complex design submissions. If Developer requests and the CO approves a fast track design, the design review performance periods shall be scheduled to avoid federal holidays and overlapping review periods for submissions. The Government intends to review and approve design deliverables in accordance with the DBEA.